THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

SOCIAL SERVICES LEGISLATION AMENDMENT
(_DRUG TESTING TRIAL_) BILL 2018

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Minister for Social Services, the Hon Dan Tehan MP)
OUTLINE

This Bill provides for the trialling of a new approach to identifying job seekers with substance abuse issues by drug testing 5000 new recipients of Newstart Allowance and Youth Allowance (other) in three discrete locations over two years.

Financial impact statement

The financial impact of these amendments is not for publication.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

The statement of compatibility with human rights appears at the end of this explanatory memorandum.
NOTES ON CLAUSES

Abbreviations used in this explanatory memorandum

- **Social Security Act** means the *Social Security Act 1991*;
- **Social Security Administration Act** means the *Social Security (Administration) Act 1999*;
- **Family Assistance Act** means the *A New Tax System (Family Assistance) Act 1999*;
- **Family Assistance Administration Act** means the *A New Tax System (Family Assistance)(Administration) Act 1999*;
- **Farm Household Support Act** means the *Farm Household Support Act 2014*;
- **Welfare Reform Bill** means the *Social Services Legislation Amendment (Welfare Reform) Bill 2017*.

**Clause 1** sets out how the new Act is to be cited – that is, as the *Social Services Legislation Amendment (Drug Testing Trial) Act 2018*.

**Clause 2** provides a table setting out the commencement dates of the various sections in, and Schedules to, the new Act.

**Clause 3** provides that each Act that is specified in a Schedule is amended or repealed as set out in that Schedule.
Schedule 1 – Amendments

Summary

This Schedule provides for a two year trial involving mandatory drug testing for 5,000 new recipients of Newstart Allowance and Youth Allowance (other) in the Canterbury-Bankstown, New South Wales; Logan, Queensland and Mandurah, Western Australia, regions.

Background

This Schedule will enable mandatory drug testing to be trialled for two years in three discrete regions for new recipients of Newstart Allowance and Youth Allowance (other).

Substance abuse is a major barrier to social and economic participation and is not consistent with community expectations around receiving taxpayer funded welfare payments. The aim of the trial is to improve a recipient's capacity to find employment or participate in education or training by identifying people with drug use issues and assisting them to undertake treatment. The trial will test the effectiveness of decreasing substance abuse through random drug testing, in an effort to improve employment outcomes for trial participants.

The trial will be conducted in three locations. These locations were selected considering a range of factors, including crime statistics, drug use statistics, social security data and health service availability. The trial locations are not in Community Development Program areas.

Acknowledgement of trial participation at claim

All people making a claim for Newstart Allowance or Youth Allowance (other) after the commencement of this measure will be asked to acknowledge in the claim form that they may be required to undergo drug testing as a condition of payment, if they reside in a trial site.

Drug testing regime

Five thousand new recipients of Newstart Allowance and Youth Allowance (other) after commencement of the trial will be randomly selected to undertake a drug test. Recipients selected will be notified to attend an appointment at their local Centrelink office consistent with standard Department of Human Services' appointment requirements.

At the appointment, recipients will be notified they are required to undertake a random drug test immediately. Drug testing of selected Newstart Allowance and Youth Allowance (other) recipients will be administered by third party drug testing providers contracted for that purpose, either in a private space at the Centrelink office or on the provider's premises nearby, adhering to strict privacy principles specified in legislation.
Recipients who test positive for illicit drugs specified as part of the trial at this initial drug test will be subject to income management for a 24 month period. If the recipient’s payment is cancelled during the 24 month period and later reclaimed, they will return to income management for the remainder of the 24 months. If the recipient’s first test is negative they will not be subject to income management.

Recipients who test positive to the initial drug test, in addition to being placed on income management, will be subject to further random tests during the trial period, the first of which will occur within 25 working days of the initial positive test.

Recipients who test positive to more than one drug test in the 24 month period will be referred to a Department of Human Services’ contracted medical professional for assessment. If the medical professional recommends treatment, the recipient will be required to complete the recommended treatment activities designed to address their substance abuse as part of their Employment Pathway Plan (also known as a Job Plan). These activities may include rehabilitation, counselling or ongoing drug testing. Where treatment is not immediately available, recipients will be required to take appropriate action such as being on a waiting list to satisfy part of their mutual obligation requirements. Recipients with a drug treatment activity in the plan may still be required to undertake other activities, including job search, depending on their circumstances.

Further drug test/s will be conducted during the 24 months of the trial period.

Recipients who fail to meet the terms of their Employment Pathway Plan including any drug treatment activities would be subject to the participation payment compliance framework. Reasonable excuse provisions would continue to apply; however, not where the reason is wholly or substantially attributable to drug or alcohol use and the person has refused available and appropriate treatment. This measure is subject to the passage of the Social Security Legislation Amendment (Welfare Reform) Bill 2017.

Recipients who refuse to take the test (whether first or subsequent tests) will have their payment cancelled with effect from the day on which the refusal occurred, unless the person has a reasonable excuse. Suspension will not be an option.

If the person then makes a new claim for Newstart Allowance or Youth Allowance (other) following cancellation, the payment will not be payable for a 4-week period from the date of cancellation. Recipients who subsequently return to payment after their waiting period will still be subject to the trial and required to undergo random drug testing as a condition of their ongoing receipt of payment. The 4-week period only applies to recipients whose payment was cancelled because of their refusal to take the drug test despite acknowledging and accepting that they may be subject to drug testing as part of their initial claim for payment.

If a recipient tests positive to a second or any subsequent test, they will be required to repay the cost of these tests which can be done through a small percentage reduction of their fortnightly social security payment. Financial hardship provisions will ensure no one is adversely affected.
The cost of the test (that is, the amount to be repaid) will be an amount determined by the Secretary in an instrument and will be no more than the lowest cost that any test is available to the Department of Human Services under their contract with the drug testing provider. The cost will be deducted from future social security payments at a rate percentage set by the Secretary, capped at a maximum of 10 per cent. The Secretary will also be able to vary the person’s repayment rate if they are experiencing financial hardship, or increase that rate at their request.

If a recipient disputes the result of their initial drug test and requests another test, the retest will be at the recipient’s own expense if the result of the retest is positive.

If the recipient’s payment, for reasons other than refusing to take a drug test, is suspended or cancelled prior to the second drug test and the recipient subsequently becomes qualified and the payment is payable, the second test will be conducted within 25 working days of the person becoming qualified and the payment being payable (irrespective of any gap in payment) during the trial period.

However, recipients who receive a payment of farm household allowance made under the Farm Household Support Act will not be subject to the drug testing trial.

**Compliance with notices**

Recipients who are part of the drug testing trial and fail to attend scheduled appointments with the Department of Human Services will have their payment suspended until they attend a rescheduled appointment. When the recipient attends a rescheduled appointment their payment will be resumed but will not be backdated to the date of suspension, unless the recipient has a reasonable excuse for not attending, such as unforeseen caring responsibilities. If no reasonable excuse exists, their payment will be payable from the date of their attendance at the rescheduled appointment. After 13 weeks, if the recipient has not attended an appointment, their payment will be cancelled. If the recipient provides prior notice to the Department of Human Services of a reasonable excuse for not being able to attend the appointment, such as work commitments, their appointment will be rescheduled.

The amendments made by this Schedule commence on the first 1 January, 1 April, 1 July or 1 October, to occur after the end of the period of two months beginning on the day this Act receives Royal Assent.
Explanation of the changes

Schedule 1 - Amendments

Part 1 – Amendments commencing first

Division 1 – Main amendments

Social Security Act

Item 1 amends subsection 23(1) and inserts a number of definitions for the purposes of the drug testing trial.

Drug test means, in relation to a person, a test that is carried out in accordance with applicable drug test rules (if any) directly or indirectly under a contract with the Commonwealth that was entered into for the purposes of carrying out the test and is for the presence of a testable drug in a sample taken in the drug test trial period from the person’s saliva, urine or hair.

Drug test rules means rules made under new section 38FA.

Drug test trial area means any of the following:

(a) the part of New South Wales that was the area named Canterbury-Bankstown for the purposes of the Local Government Act 1993 (NSW), as at the start of 1 January 2018;
(b) the part of Queensland that was the local government area named Logan for the purposes of the Local Government Act 2009 (Qld), as at the start of 1 January 2018;
(c) the part of Western Australia that was the district named Mandurah for the purposes of the Local Government Act 1995 (WA), As at the start of 1 January 2018.

For the purposes of the definition in paragraph (a) above, the description of the Canterbury-Bankstown area can be found in item 2 of Schedule 2 to the Local Government (Council Amalgamations) Proclamation 2016 (NSW) as in force on 7 November 2016.

For the purposes of the definition in paragraph (b) above, the description of the Logan area can be found in the area map referred to in column 3 of the table item for that area in Schedule 1 to the Local Government Regulation 2012 (Qld) as in force on 30 June 2017.
For the purposes of the definition in paragraph (c) above, the Mandurah boundaries can be described as all that portion of land as promulgated in Government Gazettes on 10 June 1949 (pages 1248 to 1249) and amended by the Government Gazettes on 6 November 1959 (page 2750), 2 September 1960 (page 2834), 18 October 1968 (page 3105) 27 June 1969 (page 1878), 4 February 1972 (page 216) and 31 December 1996 (pages 7252 to 7253).

**Drug test trial period** means the 24 months starting on the commencement of this definition. That is, if the amendments establishing the two year drug testing trial commence on 1 July 2018, then the 24 month period starts on 1 July 2018 and ends on 30 June 2020. However, if the amendments commence on, say, 1 October 2018, then the 24 month period starts on 1 October 2018 and ends on 30 September 2020, and so on.

**Drug test trial pool member** provides that a person is a drug test trial pool member at a time if:

(a) that time is in the drug test trial period (as defined in section 23(1)); and

(b) at that time the person’s usual place of residence is in a drug test trial area; and

(c) at that time the person is:

(i) receiving Newstart Allowance; or

(ii) receiving Youth Allowance (other) (that is, a Youth Allowance recipient who is not a full-time student or a Youth Allowance Australian apprentice); as a result of a claim made during the drug test trial period; and

(d) when the claim was made the person acknowledged on their claim form that they may be subject to the drug testing trial; and

(e) if the claim was for Youth Allowance—the claim was for Youth Allowance (other).

**Positive drug test** means, in relation to a person, an indication by a drug test that a testable drug was present in a sample of the person’s saliva, urine or hair given by the person in compliance with a requirement notified to the person under new paragraph 63(4)(c) of the Social Security Administration Act.

**Testable drug** means methamphetamine, methylenedioxy-methamphetamine, tetrahydrocannabinol, opioids or another substance prescribed by the drug test rules for the purposes of this definition.

**Item 2** inserts new paragraph (cb) into the definition of **waiting period** so that a Newstart Allowance drug test refusal waiting period applies for the purposes of new sections 623C and 623D.
**Item 3** adds **new section 38FA** at the end of Part 1.3. New section 38FA provides a discretion for the Minister to make drug test rules, by legislative instrument, providing for and in relation to the following:

(a) prescribing substances for the purposes of the definition of testable drug in subsection 23(1);

(b) giving and taking of samples of persons’ saliva, urine or hair for use in drug tests;

(c) dealing with such samples;

(d) carrying out drug tests;

(e) giving of results of drug tests in certificates or other documents and the evidentiary effect of those certificates or documents;

(f) confidentiality and disclosure of results of drug tests;

(g) requirements relating to contracts entered into for the carrying out of drug tests;

(h) keeping and destroying records relating to samples for use in drug tests or drug tests.

The intention is that the drug test rules will set out high level protocols that will apply for conducting the drug tests, including in relation to the use and disclosure of test results. This provides additional safeguards to ensure the operation of the drug testing is consistent with the requirements under the *Privacy Act 1988* and the confidentiality provisions in the *Social Security Administration Act*.

The reason for the use of delegated legislation to set out the rules for conducting the tests is that these technical and more administrative details rely to an extent on the advice of the preferred tenderer for the provision of drug testing trial services as well as other stakeholders. Use of a legislative instrument gives the necessary flexibility to ensure that the arrangements for the drug testing will meet the intention of the legislation but can accommodates practicalities that may have been unknown at time the Bill was drafted.

The Department has been engaging with stakeholders from the health, alcohol and other drug, and welfare sectors and this consultation will be ongoing. The Department has spoken to all state and territory governments as well as a range of drug and alcohol treatment providers and peaks, and related experts across the country, and in the trial sites. The advice and feedback of stakeholders will be considered in finalising the Drug Test Rules.
The minimum requirements, including qualifications, of the drug test provider and its officers will also be set out in the Drug Test Rules. While the Drug Testing Rules have not been finalised at this stage, it is intended that the drug testing provider will need to deliver testing services in accordance with the relevant Australian Standards (where these exist) being AS/NZS 4308:2008 Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine and AS4760:2006 Procedures for specimen collection and the detection and quantitation of drugs in oral fluid. It is also intended that the provider will also be required by the Rules to utilise authorised laboratories — those accredited by the National Association of Testing Authorities, Australia — and to use authorised analysts and collecting agencies for the purposes of analysing the results of samples taken for drug testing.

With respect to privacy concerns, there are existing privacy safeguards in place under the Privacy Act 1988 and the confidentiality provisions in Division 3 of Part 5 of the Administration Act. These confidentiality provisions stipulate that protected information, including any personal information such as health information, can only be accessed, used or disclosed in limited circumstances. This includes for the purposes of administering the social security law; for research, statistical analysis or policy development; and where it has been certified as being in the public interest.

These existing safeguards will apply to any information gathered as part of this trial, including that obtained or generated by the drug test provider. Any accessing, use or disclosure of this information, including test results, will only occur in accordance with these existing laws.

An exposure draft copy of the Drug Testing Rules was tabled by the Department of Social Services when it appeared at the hearings for the Senate Community Affairs Legislation Committee’s inquiry into the Welfare Reform Bill on 30 August 2017. The Rules remain subject to change, including from information obtained from the procured drug testing provider.

**Item 4** inserts new subsection 544B(1AA) into section 544B. New section 544B(1AA) provides that one of the requirements of a Youth Allowance Employment Pathway Plan that is in force in relation to a person must relate to the person undertaking treatment for the use of drugs. This requirement applies if a drug test trial pool member who has had two or more positive drug tests and has undergone a medical, psychiatric or psychological examination in accordance with a notice given under subsection 63(4) of the Social Security Administration Act after the second (or further) positive drug tests and the report of the examination given to the Secretary recommends that the person undertake treatment for the use of drugs.

The intention is that the Secretary could formulate the requirement as one to undertake treatment (if treatment is available) or as one to commit to undertaking treatment if it is not available when the requirement is included in the plan but becomes available later.

**Item 5** adds new paragraph 549(2)(c) so that Youth Allowance is not payable to a person while the person is subject to a drug test refusal waiting period for the purposes of new sections 549EA and 549EB.
Item 6 inserts new section 549EA. New section 549EA sets out the circumstances in which a person is subject to a drug test refusal waiting period. A person is subject to this waiting period if the person fails to comply with a notice given under paragraph 63(4)(c) of the Social Security Administration Act, that results in the person’s Youth Allowance not being payable under section 64 of the Social Security Administration Act and being cancelled under section 80 of that Act. If, after the non-compliance with the notice, the person qualifies for Youth Allowance (other), the person will be subject to the waiting period.

The intention is that a person’s payment will be cancelled with immediate effect, if the person refuses a drug test, noting that they previously acknowledged and accepted potential drug testing as a condition of payment when they claimed the payment. Consequently, cancellation will trigger the waiting period to prevent Youth Allowance being payable for that period if the person makes a new claim for Youth Allowance.

The note under section 549EA clarifies that paragraph 63(4)(c) of the Social Security Administration Act is about giving a sample for a drug test.

New section 549EB provides for the length of the drug test refusal waiting period. The period is 28 days starting on the day of the cancellation of the person’s Youth Allowance.

Item 7 inserts new subsection 606(1AA) into section 606. New subsection 606(1AA) provides that one of the requirements of a Newstart Employment Pathway Plan that is in force in relation to a person must relate to the person undertaking treatment for the use of drugs. This requirement applies if a drug test trial pool member who has had two or more positive drug tests and has undergone a medical, psychiatric or psychological examination in accordance with a notice given under subsection 63(4) of the Social Security Administration Act after the second (or further) positive drug tests and the report of the examination given to the Secretary recommends that the person undertake treatment for the use of drugs.

The intention is that the Secretary could formulate the requirement as one to undertake treatment (if treatment is available) or as one to commit to undertaking treatment if it is not available when the requirement is included in the plan but becomes available later.

Item 8 adds new sections 623C and 623D at the end of Subdivision E of Division 1 of Part 2.12. New section 623C sets out when a drug test refusal waiting period applies due to a person’s non-compliance with a notice requiring the person to do an act described in paragraph 63(4)(c) of the Social Security Administration Act. A person is subject to this waiting period if the person fails to comply with a notice given under paragraph 63(4)(c) of the Social Security Administration Act, that results in the person’s Newstart Allowance not being payable under section 64 of the Social Security Administration Act and being cancelled under section 80 of that Act.

The note under section 623C clarifies that paragraph 63(4)(c) of the Social Security Administration Act is about giving a sample for a drug test.
New section 623D provides that the duration of the drug test refusal waiting period is 28 days starting on the day of the cancellation of the person’s Newstart Allowance.

**Item 9** inserts into the Youth Allowance Rate Calculator new paragraph (ba) in step 14 of the method statement under point 1067G-A1. Under new paragraph (ba), the amount of the drug test repayment deduction (worked out in accordance with Part 3.16C) should be subtracted from the provisional fortnightly payment rate if there is any amount remaining after subtracting any special employment advance deduction or any advance payment deduction.

**Item 10** inserts into Benefit Rate Calculator B new paragraph (ba) in step 7 of the method statement under point 1068-A1. Under new paragraph (ba), the amount of the drug test repayment deduction (worked out in accordance with Part 3.16C) should be subtracted from the provisional fortnightly payment rate if there is any amount remaining after subtracting any special employment advance deduction or any advance payment deduction.

**Item 11** inserts new Part 3.16C (Drug test repayment deductions) after existing Part 3.16B (Advance payment deductions). This new Part inserts new sections 1206XA, 1206XB, 1206XC, 1206XD, 1206XE and 1206XF.

New section 1206XA provides for drug test repayment deductions to be made from a person’s Newstart Allowance or Youth Allowance (other). New subsection 1206XA(1) provides that a drug test repayment deduction is to be made from the rate of Newstart Allowance or Youth Allowance (other) that is payable to a person.

New subsection 1206XA(2) provides that a person has a drug test repayment deficit, at a time, if the sum of all the drug test repayment amounts that arose for the person before that time exceeds the sum of the amounts by which instalments of social security benefit paid to the person before that time have been properly reduced by the making of drug test repayment deductions. The intention is that all a person’s drug test repayment amounts (for life) and all reductions of instalments (for life) are taken into account in working out whether a person has a deficit.

For example, if a person has returned a positive drug test, not including the initial drug test, they will be required to repay the amount determined by the Secretary (not greater than the lowest test cost available to the Department of Human Services under contract), an amount of $80 has been used for the purposes of this example. Repayment will commence from the next social security payment once the Department of Human Services become aware of a drug test repayment requirement for a person. If the repayment rate is set by the Secretary at 5 per cent, and the person’s rate of Newstart Allowance is calculated to be $535.60 – the maximum basic rate – this person will have an amount of $26.80 deducted from their payment rate and credited to their drug test repayment balance. This will reduce their outstanding balance to $53.20. If they subsequently return a further positive drug test, the amount to be repaid for that test will be added to their balance. If a person leaves payment with an outstanding drug testing repayment balance and subsequently returns to payment, they will continue to pay off that balance by rate reduction.
For clarity, the reference to social security benefit by virtue of subsection 1206XA(1) is Newstart Allowance or Youth Allowance (other).

The reference to ‘proper’ reduction is intended to cover the possibility that deductions may be made because of a positive drug test that a contractor later says should not be taken into account. New subsection 1206XA(5) will then apply so that the amount of the deficit can be recalculated to exclude the drug test repayment amount that arose from that test.

New subsection 1206XA(3) provides that the amount of the drug test repayment deficit is the amount outstanding (the excess) that is owed by a person for any positive drug test at a point in time after a person’s instalment of Newstart Allowance or Youth Allowance (other) has been reduced by the making of a drug test repayment.

New subsection 1206XA(4) provides that a drug test repayment amount arises for each positive drug test for the person if the drug test was carried out at the request of the person and use a sample given by the person in compliance with the first notice given under paragraph 63(4)(c) of the Social Security Administration Act.

New subsection 1206XA(5) provides that a drug test repayment amount is taken not to have arisen for a person from a positive drug test if the contractor who carried out the test gives a written notice to the Secretary that the test should not be taken into account for the purposes of this Part. For example, if the contractor becomes aware that of a false positive test result such as when they are provided with evidence that the person is taking legal medication which may cause this, the contractor will be required under the drug testing rules to notify the Secretary that the test should not be taken into account for the purposes of a drug test repayment deduction. The criteria for guiding when the contractor would give a written notice will be provided in the drug test rules.

New subsection 1206XA(6) provides that the amount of the drug test payment amount is the amount prescribed by legislative instrument under subsection 1206XA(7).

New subsection 1206XA(7) provides a discretion for the Secretary to make a legislative instrument for the purposes of subsection 1206XA(6). In doing so, the Secretary must have regard to the lowest cost to the Commonwealth of any drug test that could be carried out at the time the legislative instrument is to commence.

New section 1206XB sets out the basic calculation for working out the amount of the drug test repayment deduction.

New subsection 1206XB(1) provides that the amount of a drug test repayment deduction is the percentage, worked out in accordance with subsection 1206XB(3), and section 1206XC or 1206SD (if relevant).
To work out the amount of Newstart Allowance that is payable to a person where a drug test repayment deduction applies, the amount of the person’s rate of Newstart Allowance is worked out under step 7 of the method statement in point 1068-A1, disregarding paragraph (ba) and (c) of that step.

To work out the amount of Youth Allowance that is payable to a person where a drug test repayment deduction applies, the amount of the person’s rate of Youth Allowance is worked out under step 14 of the method statement in point 1067G-A1, disregarding paragraphs (ba) and (c) of that step.

New subsection 1206XB(2) provides that subsection (1) has effect subject to section 1206XE.

New subsection 1206XB(3) provides that for the purposes of subsection (1), the percentage is the percentage prescribed by legislative instrument under subsection (4). Subsection (3) has effect subject to sections 1206XC and 1206XD.

New subsection 1206XB(4) provides a discretion for the Secretary to make a legislative instrument for the for the purposes of subsection (3). The instrument must not prescribe a percentage greater than 10 per cent.

New section 1206XC enables a person to request a greater percentage for their drug test repayment deduction.

New subsection 1206XC(1) provides that the percentage for working out a person’s drug test repayment deduction is increased to a greater percentage if the person asks the Secretary in writing for it to be increased.

New subsection 1206XC(2) provides that subsection (1) does not apply if the Secretary is satisfied that the person would suffer severe financial hardship if the percentage is increased.

New section 1206XD provides for the Secretary to reduce the amount of the percentage for a person’s drug test repayment deduction if the person is in severe financial hardship.

New subsection 1206XD(1) provides a discretion for the Secretary to determine that, for a specified period, the percentage for working out a person’s drug test repayment deduction may be a percentage (which may be nil) that is less than the percentage that would otherwise apply, if the Secretary is satisfied that:

(a) the person’s circumstances are exceptional; and

(b) the person would suffer severe financial hardship if the percentage that would otherwise apply were to continue to apply.
New subsection 1206DX(2) provides a discretion for the Secretary, at any time while the determination is in force, to:

(a) vary the determination so that a percentage that is greater than that previously determined under subsection (1) will apply but will be less than the percentage that applied immediately prior to the determination under subsection (1) have been made; or

(b) revoke the determination;

but only if the Secretary is satisfied that the person would not suffer severe financial hardship because of the variation or revocation.

New section 1206XE provides for the final drug test repayment deduction where the person’s drug test repayment deduction is greater than the amount of the person’s drug test repayment deficit. In these circumstances, if an instalment of a person’s Newstart Allowance or Youth Allowance is reduced by a drug test repayment deduction that is greater than the amount of the person’s drug test repayment deficit, then the deduction is reduced so that the person’s instalment is reduced by the amount of the deficit. For example, where a person has a drug test repayment balance of $20 and they are entitled to the maximum basic rate of Newstart Allowance that fortnight – $535.60 – their repayment amount will only be $20 and not the $26.80 that would otherwise be calculated according to the rate calculator formula.

New section 1206XF provides for the rounding up to the nearest cent (rounding 0.5 cents upwards) for amounts worked out under this Part.

Social Security Administration Act

Item 12 inserts new subsection 37(7A) into section 37. New subsection 37(7A) modifies the obligation for the Secretary to grant a claim for Newstart Allowance or Youth Allowance under subsection 37(1) so that the requirements under subsection 37(1) are subject to subsection 37(7A). Subsection 37(7A) provides that despite subsections (2), (3), (6) and (7), the Secretary must not, in a drug test trial period, determine that a claim for Newstart Allowance or Youth Allowance by a potential drug test trial pool member is to be granted unless the Secretary is satisfied that the claimant acknowledged in the claim that the claimant could be required to give samples for drug tests to be carried out in that period.

Item 13 is consequential to item 15, which inserts a new paragraph into subsection 63(4).
**Item 14** inserts **new subsection 63(2A)**, which provides a discretion for the Secretary to notify a person under subsection (2) that he or she is required, at or within a specified time, to do an act described in paragraph (2)(a) if:

(a) the person was earlier, while the person was a drug test trial pool member, required under that subsection to do that act or thing but did not comply with that earlier requirement; and

(b) because of that non-compliance and subsection 64(1), the Newstart Allowance or Youth Allowance that the person received as a drug test trial pool member is not payable to the person (whether or not the payment is suspended).

To avoid doubt, the notification is taken for all purposes to be under subsection (2).

**Item 15** inserts **new paragraph 63(4)(c)**, which provides that if the Secretary is of the opinion that a person who is a drug trial pool member should give a sample of a particular kind at a particular place for a drug test to be carried out (at that place or elsewhere) on the sample, the Secretary may notify the person that he or she is required within a specified time to give a sample.

**Item 16** inserts **new subsections 63(4A) and (4B)**. New subsection 63(4A) provides that the Secretary must not notify a person of a requirement to give a sample for a drug test as described in paragraph 63(4)(c) if 5,000 other persons have given samples in compliance with the such requirements. This is whether or not any of those 5,000 persons had given two or more samples under one or more such requirements.

The note under subsection 63(4A) clarifies that this does not prevent the Secretary from notifying a particular person multiple times of such requirements, as long as fewer than 5,000 other persons have given samples under such requirements.

New subsection 63(4B) provides that the Secretary may also notify a person under subsection 63(4) that he or she is required, at or within a specified time, to do an act or thing described in paragraph (4)(b) or (c) if:

(a) while the person was a drug test trial pool member, the person was earlier required under that subsection to do that act or thing or under subsection (2) to attend an office of the Department but did not comply with that earlier requirement; and

(b) because of that non-compliance and subsection 64(1), the Newstart Allowance or Youth Allowance the person received as such a member is not payable to the person (whether or not the payment is suspended).

To avoid doubt, the notification is taken for all purposes to be under subsection (4).
Schedule 1 – Amendments

Item 17 inserts **new subsection 64(1AA)** into section 64. New subsection 64(1AA) provides that a notice of a requirement to do an act described in paragraph 63(4)(c) is not unreasonable for the purposes of paragraph 64(1)(c) merely because of the nature of the act (even if it is not the first notice requiring the person to do such an act). For example, if a person attends an office of the Department in accordance with a section 63(2) notice and, at that time, is given a section 63(4)(c) notice to give a sample immediately (or shortly after attending the office), the requirement to give a sample is not unreasonable merely because of its nature, for the purposes of paragraph 64(1)(c).

Item 18 inserts **new section 64A** after section 64, which provides for the contractual arrangements that relate to drug tests. New subsection 64A(1) provides that, for the purposes of paragraph 63(4)(c), the Secretary may, on behalf of the Commonwealth, enter into contracts for the carrying out of drug tests as mentioned in that paragraph. New subsection 64A(2) provides that a contract mentioned in subsection (1) must meet any requirements prescribed by the drug test rules. New subsection 64(3) sets out that without limiting subsection (2), the drug test rules may require a contract mentioned in subsection (1) to include provisions requiring the following:

(a) give the Secretary written notice of the results of the drug test. In this situation, the contractor must be satisfied that there is a positive drug test result for the person; and

(b) give notice as mentioned in paragraph 123UFAA(1A)(c) (written notice that the person should be subject to the income management regime, see item 24) in circumstances prescribed by the drug test rules. In this case, if a person's drug test result is positive, the contractor will give a notice to the Secretary that the person should be subject to income management; and

(c) withdraw or revoke a notice as mentioned in paragraph 123UFAA(1A)(d) in circumstances prescribed by the drug test rules. For example, if a person requests a second drug test which results in a negative result or if the contractor receives evidence that the person is taking legal medication which could cause a false positive result, the contractor can withdraw or revoke a notice that was previously given a notice under paragraph 123UFAA(1A)(c); and

(d) give notice as mentioned in subsection 1206XA(5) of the Social Security Act (written notice that the a positive drug test should not be taken into account, see item 11) in circumstances prescribed by the drug test rules. For example, if the contractor becomes aware that of a false positive test result such as if the contractor received evidence that the person is taking legal medication which could cause a false positive result, the contractor will be required under the drug testing rules to notify the Secretary that the test should not be taken into account for the purposes of a drug test repayment deduction; and

(e) any subcontracts to include provisions requiring matters mentioned in paragraphs (a) to (d).
Item 19 is consequential to item 20, which is a technical amendment for the purposes of adding new subsections into section 110A.

Item 20 adds new subsection 110A(2) and (3), which sets out the consequence if a drug test pool member fails to comply with a notice given under paragraph 63(2)(a), 63(4)(b) or 63(4)(c).

In accordance with new subsection 110A(2), subsection 110A(3) applies if:

(a) a drug test pool member’s Newstart Allowance or Youth Allowance was suspended under subsection 64(1) because the person did not comply with a requirement (the earlier requirement) to do an act or thing in accordance with a notice that was given under paragraph 63(2)(a), 63(4)(b) or 63(4)(c) while he or she was a drug test pool member; and

(b) if the earlier requirement was to do an act described in paragraph 63(2)(a), it is reasonable to expect that, had the person complied with the earlier requirement, the person would have been required to do an act (give a sample) described in paragraph 63(4)(c); and

(c) the person complies with:

(i) a later requirement under subsection 63(2) or (4) to do the act or thing required by the earlier requirement; and

(ii) if the earlier requirement was to do an act described in paragraph 63(2)(a), a later requirement to do an act (give a sample) described in paragraph 63(4)(c); and

(d) a favourable determination is made under section 85 to resume payment of social security payment to the person.

New subsection 110A(3) provides that a favourable determination takes effect, or is taken to have taken effect:

(a) when the person met the condition in paragraph 110A(2)(c); or

(b) if the Secretary is satisfied that the person had a reasonable excuse for not complying with the earlier requirement, on the day on which the person was required by the earlier requirement to do the act or thing concerned.

The intention is that a person’s Newstart Allowance or Youth Allowance will not be backdated to the date of suspension but will only be payable from the date the person attended an appointment in accordance with the later notice, unless the Secretary is satisfied that the person had a reasonable excuse (for example, was required to attend a job interview at short notice) for not attending the appointment in accordance with the earlier notice and can provide evidence of this.
Item 21 inserts new paragraph (gb) in the simplified outline of Part 3B which appears in section 123TA. New paragraph (gb) sets out a new circumstance in which a person may become subject to the income management regime in Part 3B. The new paragraph provides that a person may become subject to the income management regime if there is a positive drug test for the person and the tester tells the Secretary that the person should be subject to the income management regime.

Item 22 repeals the current heading for section 123UFAA and substitutes a new heading. The new heading reflects the inclusion in section 123UFAA of new subsection 123FUAA(1A), which provides for the referral of a person to income management if the person has a positive drug test.

Item 23 amends paragraph 123UFAA(1)(g) to insert the words ‘or subsection (1A) of this section’ at the end of the paragraph. This amendment is intended to ensure that if a person is subject to the income management regime under new subsection 123UFAA(1A) (see item 24), the person cannot become subject to the income management regime under subsection 123UFAA(1). Therefore, if a person has already been referred onto income management by way of a written notice from a contractor under new subsection 123UFAA(1A) a person cannot be subject to income management under subsection 123UFAA(1) on the basis of a referral from a recognised State/Territory authority.

Item 24 inserts new subsections 123UFAA(1A), (1B), (1C) and (1D) after subsection 123UFAA(1).

New subsection 123UFAA(1A) provides for a new circumstance in which a person can be made subject to the income management regime in Part 3B.

Under new subsection 123UFAA(1A) a person is subject to the income management regime at a particular time (the test time) if:

(a) at the test time, the person is an eligible recipient of a category H welfare payment (as defined in section 123TC); and

(b) before the test time, there was a positive drug test for the person; and

(c) in the 24 months, or longer period (if any) determined under new subsection 123UFAA(1B), before the test time, the contractor who carried out the test gave the Secretary a written notice saying that the person should be subject to the income management regime under this subsection. The circumstances under which such a notice may be given will be provided in the drug test rules, for instance, if the drug test result is positive; and

(d) at the test time, the notice has not been withdrawn or revoked; and

(e) at the test time, the person is not covered by a determination under new subsection 123UFAA(1C); and
(f) if, at the test time, the person has a Part 3B payment nominee—the Part 3B payment nominee is not an excluded Part 3B payment nominee; and

(g) at the test time, the person is not subject to the income management regime under section 123UC (the child protection measure of income management), 123UD (the school enrolment measure of income management), 123UE (the school attendance measure of income management) or 123UF (referral onto income management by the Queensland Commission) or subsection (1) of this section (referral onto income management by a recognised State/Territory authority).

New subsection 123UFAA(1B) provides that the Secretary may by legislative instrument, determine a period longer than 24 months for the purposes of paragraph (1A)(c). The intention is to give the Secretary the discretion to extend the period of income management for longer than the 24 month trial period. For example, if a person continues to return a positive drug test during the 24 month trial period, the person will continue to be subject to income management after the drug testing trial ends. It is intended that this provision would be used where it is considered to be beneficial to a person’s drug rehabilitation outcome to remain on income management for a longer period of time.

New subsection 123UFAA(1C) provides that the Secretary must determine that a person is not subject to the income management regime under new subsection 123UFAA(1A) if the Secretary is satisfied that being subject to the regime under that subsection poses a serious risk to the person’s mental, physical or emotional wellbeing. The intent of this provision is to protect those persons who, based on documentary evidence, may seriously be at risk of adverse impacts on their mental, physical or emotional wellbeing as a result of being subject to the income management regime.

New subsection 123UFAA(1D) provides that the Secretary is not required to actively take steps to assess every trial participant, who is referred to income management, to decide whether being subject to income management would seriously risk that person’s mental, physical or emotional wellbeing. The Secretary will consider making this determination once he or she is made aware of facts which indicate that being subject to income management may seriously risk a person’s mental, physical or emotional wellbeing. Where the Secretary is satisfied that being subject to income management would seriously risk that person’s mental, physical or emotional wellbeing and makes a determination to this effect, the person will not be subject to income management while that condition is met. If the serious risk to the person is only brought to the Secretary’s attention after they have been referred to income management and the Secretary is satisfied that being subject to the regime poses a serious risk to the person’s mental, physical or emotional wellbeing, a determination will be made, resulting in the person no longer being subject to income management while that condition is met.
Paragraphs 123UFAA (1C) and (1D) were strengthened in response to the Government’s Scrutiny of Bills Committee’s comments on the Social Services Legislation Amendment (Welfare Reform) Bill 2017 regarding restriction of judicial review with regard to the Secretary’s obligations to remove people from the income management regime if he is satisfied it poses a serious risk to their health.

**Item 25** amends paragraph 123UFAA(2)(c) to add the words ‘or (1A)’ at the end of the paragraph. Subsection 123UFAA(2) currently provides that, for the purposes of Part 3B, a person is subject to the income management regime at a particular time (the test time) if:
(a) at the test time, the person is not subject to the income management regime under any other provision of Subdivision A of Division 2 of Part 3B; and
(b) at the test time, the person has a Part 3B payment nominee; and
(c) at the test time, the Part 3B payment nominee is subject to the income management regime under subsection (1).

This item amends paragraph 123UFAA(2)(c) to provide that a person’s Part 3B payment nominee is also subject to the income management regime provided for in subsection 123UFAA(1A).

**Item 26** repeals the heading of Subdivision DAA of Division 5 of Part 3B and inserts a new heading. This amendment is a consequential amendment resulting from the insertion of new subsections 123UFAA(1A), (1B) and (1C) by item 24.

**Item 27** amends subsections 123XPAA(4) and 123XPAB(4) to add a **new paragraph (d)** to both subsections. The inclusion of a new paragraph (d) in subsections 123XPAA(4) and 123XPAB(4) extends the range of circumstances in which the Minister can make an instrument to specify a different percentage for the purposes of determining the person’s **deductible portion** for income management purposes. A person’s deductible portion is the amount of a person’s welfare payment that is subject to income management. New paragraph (d) in subsections 123XPAA(4) and 123XPAB(4) will ensure that where a person is subject to income management as a result of the person having a positive drug test, the Minister can make an instrument specifying a different percentage to the percentages contained in paragraphs 123XPAA(3)(a) and 123XPAB(3)(a).

**Item 28** insert the definition of **potential drug test trial pool member** into subclause 1(1) of Schedule 1.

**Potential drug test trial pool member** provides that a person is a potential drug test trial pool member at a time if:

(a) that time is in the drug test trial period (as defined in section 23(1) of the Social Security Act); and

(b) the person has, before that time and in the drug test trial period, made:
   (i) a claim for Newstart Allowance; or
   (ii) a claim for Youth Allowance (other); and
(c) at that time the claim has not been determined; and
(d) when the claim was made, the person’s usual place of residence was in a drug test trial area.

**Item 29** amends subparagraph 15(b)(i) of Schedule 2. This amendment ensures that if:

- a person claims Newstart Allowance or Youth Allowance (other);
- the person’s payment is not payable because of new paragraph 63(4)(c); and
- the person’s Newstart Allowance or Youth Allowance (other) has been cancelled, with cancellation taking effect in the previous 14 days,

a person’s start date in relation to the payment claimed is not the date of cancellation.

If a recipient of Newstart Allowance or Youth Allowance (other) does not comply with a notice under new paragraph 63(4)(c) (see item 15), the person’s payment can be cancelled under section 80 as the payment is not payable to the person under section 64. The person is then subject to a 28 day waiting period commencing on the date of cancellation (see items 6 and 8), making it necessary to amend the start date provision in subparagraph 15(b)(i) of Schedule 2.

**Division 2 – Consequential amendments**

**Farm Household Support Act**

**Item 30** inserts **new paragraph 94(นา)** after paragraph 94(na). Section 94 provides that various provisions of the Social Security Act do not apply in relation to the operation of the Farm Household Support Act. The insertion of new paragraph 94(นา) by this item will ensure that the new drug test repayment deduction provisions in Part 3.16C of the Social Security Act (inserted by item 11) will not apply to payments made under the Farm Household Support Act.

**Item 31** amends the table in section 95 to insert **new item 1A**. The table in section 95 modifies the way that particular provisions of the Social Security Act can apply in relation to payments made under the Farm Household Support Act. New item 1A will operate to ensure that paragraph (c) of the definition of **drug test trial pool member** in subsection 23(1) of the Social Security Act (inserted by item 1) applies to the Farm Household Support Act as if the words ‘(other than farm household allowance)’ were inserted after ‘Newstart Allowance’ and after ‘Youth Allowance’. The purpose of this amendment is to ensure that a person who receives farm household allowance is not to be treated as a drug test trial pool member for the purposes of the drug test trial established under this Bill.

**Item 32** amends the table in section 99 to insert **new item 13A** after item 13 of the table. The table in section 99 modifies the way that particular provisions of the Social Security Administration Act can apply in relation to payments made under the Farm Household Support Act.
New item 13A will operate to ensure that paragraph (b) of the definition of *potential drug test trial pool member* in subclause 1(1) of Schedule 1 to the Social Security Administration Act (inserted by item 28) applies to the Farm Household Support Act as if the words ‘(other than farm household allowance)’ were inserted after ‘Newstart Allowance’ and after ‘Youth Allowance’. The purpose of this amendment is to ensure that a person who receives farm household allowance is not to be treated as a potential drug test trial pool member for the purposes of the drug test trial established under this Bill.

**Part 2 – Amendments with contingent commencements**

**Division 1 – Amendments relating to jobseeker payment**

*Farm Household Support Act*

**Items 33 and 34** amend the Farm Household Support Act to substitute the reference to Newstart Allowance with a reference to Jobseeker Payment. This amendment picks up the changes made as a result of the creation of the Jobseeker Payment under Schedule 1 of the *Social Services Legislation Amendment (Welfare Reform) Bill 2017*.

*Social Security Act*

**Items 33 to 41** substitute the reference to Newstart Allowance, or the allowance, with a reference to Jobseeker Payment, or the payment. This amendment picks up the changes made as a result of the creation of the Jobseeker Payment under Schedule 1 of the *Social Services Legislation Amendment (Welfare Reform) Bill 2017*.

*Social Security Administration Act*

**Items 42 and 43** substitute the reference to Newstart Allowance, with a reference to Jobseeker Payment. This amendment picks up the changes made as a result of the creation of the Jobseeker Payment under Schedule 1 of the *Social Services Legislation Amendment (Welfare Reform) Bill 2017*.

**Item 44** inserts transitional provisions relating to the amendments made by this Part.

Subitem 44(1) maintains the operation of a Newstart Allowance drug test refusal waiting period after commencement, by providing that a person is taken to be subject to that period in relation to Jobseeker Payment.

Subitem 44(2) maintains the operation of a drug test repayment deficit in relation to a person, as if reference to a social security benefit after commencement included a reference to Newstart Allowance.

**Division 2 – Amendments relating to targeted compliance framework**
The amendments in this Division effectively reverse the effect of parliamentary amendments that were made to Schedule 15 of the *Social Services Legislation Amendment (Welfare Reform) Bill 2017* (parliamentary amendments (17) to (20) in Government sheet JC466 that were agreed to by the Committee of the Whole in the Senate on 7 December 2017).
**Social Security Administration Act**

**Item 45** repeals and substitutes a new paragraph 42AC(1)(a). Section 42AC sets out the circumstances when a person in receipt of a participation payment commits a mutual obligation failure. Under paragraph 42AC(1)(a), the person commits a mutual obligation failure when they fail to comply with a requirement that was notified to them under subsection 63(2) or (4). Section 63 of the Social Security Administration Act provides the Secretary with the power to require certain persons to do certain things, such as attend appointments or provide information. New subparagraphs 42AC(1)(a)(i) and (ii) create exceptions to this failure where the requirement relates to new paragraph 63(4)(c), in relation to new testing requirements for drug test trial pool members.

**Item 46** inserts into subparagraph 42AC(1)(c)(i) the words ‘(except a notice containing a requirement described in subparagraph (a)(i) of this subsection)’ after the words ‘subsection 63(2)’. Under subparagraph 42AC(1)(c)(i), a person in receipt of a participation payment commits a mutual obligation failure if the person fails to attend, or be punctual for, an appointment that the person was required to attend by a notice under subsection 63(2). The addition of the words ‘(except where the notice is of a kind described in subparagraph (a)(i) of this subsection)’ at the end of subparagraph 42AC(1)(c)(i), creates an exception to this failure where the notice contains a requirement described in subparagraph 42AC(1)(a)(i) (that is, a requirement that relates to new paragraph 63(4)(c), in relation to new testing requirements for drug test trial pool members).

**Item 47** is a consequential amendment as a result of **item 48**. Item 47 inserts the number ‘1’ after the word ‘Note’ at the end of subsection 42AC(1).

**Item 48** adds an additional note at the end of subsection 42AC(1) clarifying that paragraph 63(4)(c) (relevant to paragraphs 42AC(1)(a) and (c)) relates to requirements for drug test trial pool members.
STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

SOCIAL SERVICES LEGISLATION AMENDMENT (DRUG TESTING TRIAL) BILL 2018

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview of the Bill

This Bill will, from 1 July 2018, (or from the first 1 October, 1 January or 1 April that occurs not less than two months after the Bill receives Royal Assent), establish a two year trial of drug testing for 5,000 new recipients of Newstart Allowance (NSA) and Youth Allowance (other) (YA(o)) in three discrete locations.

The trial sites are Canterbury-Bankstown, New South Wales; Logan, Queensland and Mandurah, Western Australia.

People who claim NSA or YA(o) on or after commencement of the trial (intended to be 1 July 2018) and reside in a trial location will be eligible for the trial. People claiming NSA or YA(o) on or after this date will be asked to acknowledge in their claim that they may be required to participate in the drug testing trial. Claims will be unable to be determined unless this has been acknowledged by claimants who live in the trial locations at the time of their claim.

Recipients who are selected for testing will be notified of a requirement to attend an appointment with the Department of Human Services. At this appointment they will be notified of a requirement to provide a sample of saliva, urine or hair for the purposes of a drug test. Testing will be undertaken by a contracted third party provider in accordance with a set of drug testing rules which will be set out in a legislative instrument. The rules will cover issues relating to the conduct of the test to ensure that testing is conducted appropriately and in accordance with relevant standards. The contracted testing provider will be required to provide notice of the test results to the Department of Human Services.

Recipients who fail to attend this appointment will have their payment suspended until they attend a rescheduled appointment as is currently the case for other types of appointments. Those who have a reasonable excuse for missing their appointment will have their payment restoration backdated. Should a job seeker refuse to undertake the drug test, their payment will be cancelled and they will be subject to a four week waiting period, if they subsequently re-claim.

Recipients who test positive to the initial drug test will become subject to Income Management for a period of 24 months. The contracted testing provider will be
required to provide a notice to the Department of Human Services for the purpose of referring the job seeker to Income Management.

Job seekers will have the option to dispute the result of a positive test by requesting a re-test which will be an analysis of the second part of the saliva, urine or hair sample originally given. If the re-test result is also positive, the job seeker will have to repay the cost of the test. Job seekers may also provide evidence to the drug testing provider of circumstances that may affect the result of the drug test, such as a prescription for medication. The drug test provider will consider this evidence when interpreting the result of the person’s drug test and will notify the Department of Human Services if the result is invalid.

Job seekers who return a positive test result will also be subject to a second drug test within 25 working days. If the job seeker tests positive to the second test, they will need to repay an amount that will represent the cost of the test.

When required, repayment of positive drug tests will be by temporary reduction of the job seeker’s rate of payment at a rate determined by the Secretary through legislative instrument. The rate of repayment will not be set at more than 10 per cent of a person’s instalment and financial hardship provisions will apply. The amount of the test to be repaid will be set out in a legislative instrument, and will not be more than the lowest price of any type of drug test used in this trial and available to the Department of Human Services.

Recipients who test positive to a second drug test during the trial period will be referred to a suitably qualified health professional for assessment of their drug use issues and the recommendation of any treatment appropriate to the individual’s circumstances. Based on the report from the medical professional, where appropriate, recipients will be required to complete one or more activities designed to address their substance abuse as part of their Job Plan, such as rehabilitation, counselling or ongoing drug testing.

Recipients with a drug treatment activity in their Job Plan may still be required to undertake other activities, including job search, depending on their circumstances. Job search or other activities may be reduced depending on treatment requirements. Intensive treatment which precludes participation in other activities would fully meet mutual obligation requirements. Job seekers who fail to comply with their Job Plan will be subject to normal compliance actions.

Reasonable excuse provisions continue to apply, with the exception of drug or alcohol use reasons under the related proposal Tightening Reasonable Excuse for Non-compliance Due to Drug or Alcohol-Related Reasons. Under this measure, a person will not be able to continue to use drug or alcohol use issues as a reasonable excuse for not meeting their mutual obligation requirements if they have refused to engage in available and appropriate treatment. This measure is subject to the passage of the Social Services Legislation Amendment (Welfare Reform) Bill 2017.
Human rights implications

*Rights under the International Covenant on Economic, Social and Cultural Rights (ICESCR)*

This Bill engages a number of rights under the ICESCR as outlined below. Limitations on these rights are permissible where they are: determined by law; compatible with the nature of the rights in the treaty in question; seek to achieve a legitimate objective; and are a reasonable and proportionate means of achieving that objective. Measures that limit rights in a way that meets these requirements will be consistent with those rights.

The drug testing trial will be provided for by law under the amendments in this Bill. The trial has two key objectives – it seeks to:

- maintain the integrity of, and public confidence in, the social security system by ensuring that tax-payer funded welfare payments are not being used to purchase drugs or support substance abuse;
- provide new pathways for identifying recipients with drug abuse issues and facilitating their referral to appropriate treatment where required.

Substance abuse can be a major barrier to social and economic participation. Administrative data from the Department of Human Services shows that, for some job seekers, substance abuse is directly impacting their ability to undertake job search and other activities to help them gain employment. The number of job seekers using drug or alcohol abuse as an excuse for not meeting their requirements increased by 131 per cent between 2015 and 2016 while the number exempt from all requirements due to drug or alcohol dependency increased by 80 per cent between 2011 and 2016.

While there are a number of existing mechanisms for identifying job seekers with drug abuse issues, including through reasonable excuse and exemption arrangements, these mechanisms generally rely on self-disclosure by the job seeker and the disclosure is often only once the job seeker’s drug misuse has directly impacted their ability to meet their mutual obligation requirements.

The amendments in this Bill will trial drug testing as a new means of identifying job seekers for whom drug abuse is (or may become) a barrier to work, providing a disincentive for further drug use and supporting those with ongoing drug abuse issues to seek treatment.

This Bill meets the requirements for permissible limitations on rights under the ICESCR as outlined below and is therefore consistent with these rights.

*Right to social security (Article 9), the right to an adequate standard of living (Article 11) and the rights of the family and child to special protection and assistance*  

Article 9 of the ICESCR recognises the right of everyone to social security. The right to social security requires parties to establish a social security system and, within their maximum available resources, ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing,
Statement of compatibility with human rights

water and sanitation, foodstuffs, and the most basic forms of education.

Article 11(1) recognises the right of everyone to an adequate standard of living for themselves and family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The right to an adequate standard of living is closely connected to the right to social security.

Article 10 provides for the rights of family and child to special protection and assistance. These rights also overlap substantially with other rights in the ICESCR, particularly the right to social security and an adequate standard of living. In light of the close relationship between these rights, it is considered that the arguments set out below apply to a person’s rights under articles 9, 10 and 11(1) of the ICESCR.

Australia’s social security system is underpinned by a key principle that people of working age who have the capacity to work and become self-sufficient should do all they can to achieve this. In line with this principle, recipients of Newstart Allowance and Youth Allowance (other) are subject to range of obligations in return for taxpayer-funded income support which reflect the purpose of these payments – to support people while they look or prepare for work.

The amendments in this Bill will trial random drug testing as a new condition for the receipt of Newstart Allowance or Youth Allowance (other). People claiming these payments in the trial locations will be required to acknowledge this new condition in order for their claim to be granted. This is designed to ensure that these claimants are aware of and willing to meet the new conditions that apply under the trial. Job seekers who later refuse to undertake a drug test where required will have their payments cancelled and a four week waiting period will apply when re-claiming. These consequences reflect that job seekers are expected to meet all their obligations, including random drug testing for those in the trial, in return for their payments.

Recipients who are subject to this measure and who test positive to a drug test will not lose access to income support. Those who return a positive drug test will be placed on Income Management, which limits the amount of money a job seeker can receive as cash and therefore their capacity to expend their payments on drugs.

Income management does not reduce the total amount of income support available to a person, just the way in which they receive it. Under Income Management, a majority portion of a job seeker’s normal payment is quarantined and the remaining amount is paid into their regular bank account and is accessible as cash. Job seekers placed on Income Management under this trial will still be able to purchase items at approved merchants and pay rent and bills with their quarantined funds. However, the recipient will not be able to use their quarantined funds to withdraw cash, gamble, buy alcohol, tobacco products, pornography or cash-equivalent products (such as gift cards).

Income Management is already used as a welfare quarantining mechanism in a number of locations across Australia as a means of assisting recipients to manage their finances to meet their essential living costs, including food and housing. Evidence collected on Income Management in Western Australia indicates that the
program is improving the lives of many Australians. It has given many participants a greater sense of control of money, improved housing stability and purchase restraint for socially harmful products, while reducing a range of negative behaviours in their communities including drinking and violence.

Job seekers who return a positive test result will also be subject to a second drug test within 25 working days. If the job seeker tests positive to the second test, they will need to repay the amount representing the cost of the test.

Job seekers who test positive to a second or subsequent drug test will need to be repay the cost of the test through a temporary reduction of their social security instalment. Consistent with the objective of trial, this repayment requirement is designed to discourage future drug use and potential positive test results. It is intended that the trial will utilise up to three different testing methods which may have varying costs. To ensure that all job seekers are treated consistently, irrespective of the testing method used in their case, and the amount of the test to be repaid will be set at the lowest cost option. In addition, the rate of repayment will not be set at more than 10 per cent of a person’s instalment, with the option to reduce this percentage, including to zero, in cases of financial hardship. The repayment reduction will only apply to the recipient’s income support payment. Any payments made to parents for the maintenance of their children, such as Family Tax Benefit, or to meet childcare costs, would not be affected. These arrangements are designed to ensure that job seekers will not be put in the position of being unable to meet their basic needs or those of their family as a result of the requirement to repay the cost of a positive test.

Job seekers who test positive to more than one drug test will be referred to a medical professional for assessment of any appropriate treatment options. If the assessment recommends treatments, the job seeker will be required to have a treatment activity included in their Job Plan. As per existing arrangements, job seekers who fail to meet their activity requirements under their Job Plan (including any drug treatment activity requirements under this trial where appropriate treatment is available) may be subject to a financial penalty. Compliance action such as this is a standard feature under the social security law, and the placing of qualifying conditions on social security benefits (and the enforcement of those conditions) is permissible under article 9 where they are reasonable and proportionate to the objective of the policy. As noted above, a key objective of this trial is to assist job seekers with drug misuse issues to address their barriers to employment. Where a job seeker has been assessed by a medical professional as needing treatment, it is reasonable to expect the job seeker to pursue treatment as part of their Job Plan and to be subject to proportionate consequences if they fail to do so.

It is, however, important to note that the vulnerability of people and the impact of their circumstances on their ability to comply with their mutual obligation requirements is considered under social security law through reasonable excuse and exemption provisions, and delegates have significant discretionary powers regarding the application of compliance actions to consider the circumstances of each individual case.

In addition, the availability of appropriate treatment will be taken into consideration in determining the requirements that should be included in a person’s Job Plan. Job seekers will not be penalised if treatment is not available or there is a delay in being
able to access treatment. In this case, job seekers will be able to meet their treatment requirement by demonstrating a commitment to pursuing treatment when it is available (for example, being on a waiting list) and participating in other approved activities, tailored to their circumstances in the meantime.

To the extent that this trial may limit a job seeker’s rights under article 9 and article 11, this limitation is reasonable and proportionate to the objective of the trial as outlined above. There are appropriate safeguards in place to ensure that job seeker’s participating in the trial are still provided with the means to meet their basic needs and those of their families.

*Right to equality and non-discrimination*

Article 2(2) of the ICESCR recognises the right of persons to equality and not to be discriminated against in the enjoyment of their rights under the ICESCR.

This Bill engages the right to equality and non-discrimination in that it will result in differential treatment on the basis of a job seeker’s location. The use of drug testing as a condition of payment is being implemented as a trial in three areas only in order to assess the effectiveness of this type of intervention in achieving the objectives outlined above, namely ensuring taxpayer-funded income support payments are used appropriately and identifying job seekers with drug misuse issues and facilitating their referral to treatment where appropriate. There are a number of existing place-based arrangements provided for in the social security law, including Income Management and the Cashless Debit Card trial.

To the extent that this Bill limits the right to equality and non-discrimination for those in a drug testing trial location, this is reasonable and proportionate to the objective of a trial. The trial will be subject to a comprehensive evaluation which will build evidence of the effectiveness of this type of intervention in helping job seekers with drug abuse issues, and inform any decisions about extending the trial or rolling out drug testing more broadly.

The drug testing trial also engages the right to equality and non-discrimination insofar as it may involve a direct or indirect distinction on the basis of disability or illnesses associated with drug or alcohol dependency. While the drug testing trial is not specifically aimed at Indigenous Australians, statistics suggest that Aboriginal and Torres Strait Islander people experience disproportionately high levels of substance misuse compared to the Australian population generally.¹ On this basis, there may be indirect differential treatment on the basis of race.

This measure seeks to trial new ways of identifying people with drug use issues and assisting them to enter treatment where this is required to address their barriers to work. Individuals will be selected for drug testing at random. To the extent that certain cohorts may be more likely to test positive and that this may represent a limitation on the right to equality and non-discrimination (whether direct or indirect), this is reasonable and proportionate to the objectives of the trial.

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Statement of compatibility with human rights

Obligations under the Convention on the Elimination of all forms of Racial Discrimination (CERD) and the Convention on the Rights of Persons with Disability (CPRD)

To the extent that the drug testing trial engages the right to non-discrimination, including on the basis of race or disability, the trial also engages Australia’s obligations under the CERD to eliminate all forms of racial discrimination and under the CPRD. The rights of persons with a disability expressed in the CRPD largely mirror those economic and social rights set out in the ICESCR, and include rights to habitation and rehabilitation, the highest attainable standard of health and reasonable accommodation.

As noted above, it is intended that recipients will be selected for testing on the basis of their risk factors for having drug misuse issues. To the extent that certain cohorts may be more likely to test positive, this constitutes legitimate differential treatment and does not discriminate on the basis of race or disability.

Obligations under the Convention on the Rights of the Child (CRC)

The drug testing trial engages with the rights under the CRC as it is applied to people with children. Article 3 provides that in all actions concerning a child, the best interests of the child will be a primary consideration. This measure is intended to achieve the objectives of ensuring appropriate use of welfare payments (including to meet essential living costs for recipients and their families) and identifying drug use and helping people who require it to seek treatment. These objectives are in line with article 3 of CRC. Supporting and encouraging recipients to address their drug misuse issues will improve their capacity to find work and support themselves and their children. As noted above in relation to the rights under the ICESCR, including the rights of family and child to special protection and assistance, there are appropriate safeguards in place to ensure that job seekers participating in the trial are still provided with the means to meet their basic needs and those of their families.

Obligations under the International Covenant on Civil and Political Rights (ICCPR)

Right to equality before the law

Article 26 of the ICCPR provides that ‘all persons are equal before the law and are entitled without any discrimination to the equal protection of the law’. It also provides that the law must ‘prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’. The Human Rights Commission has also interpreted ‘other status’ to include disability.2

The drug testing trial engages with this right, however article 26 is subject to the principle of legitimate differential treatment, similar to Australia’s obligations under the CERD to eliminate all forms of racial discrimination and under the CPRD which

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are discussed above. For the same reasons, the drug testing trial is considered to be consistent with article 26.

**Right to privacy**

The drug testing trial engages article 17 of the ICCPR which affords the right to protection against arbitrary or unlawful interference with their privacy, family, home or correspondence. Lawful interferences with the right to privacy are permitted provided they are not arbitrary. The right to privacy extends to protecting a person’s bodily integrity against compulsory procedures, such as drug testing.

Mandatory drug testing is not prohibited under international human rights law; however it must be necessary and proportionate to achieving a legitimate objective.

The drug testing trial is a reasonable and proportionate limitation on the right to privacy under the ICCPR in order to achieve the objective of ensuring appropriate use of welfare payments and identifying people with drug misuse issues and assisting them to address those issues.

People who return a positive test will be placed on Income Management for a two year period to help them to manage their finances and limit their access to cash which could be spent on further harmful drug use. Other elements of the measure, including the compulsory referral to health professionals for assessment if more than one positive test is returned during the trial period and subsequent inclusion of appropriate treatment in a person’s Job Plan, are also reasonable and proportionate to achieving these objectives.

This trial will be subject to the existing safeguards in the Privacy Act 1988 and the confidentiality provisions in the Social Security (Administration) Act 1999 which protect the collection, use and disclosure of protected information. A joint Privacy Impact Assessment by the Department of Human Services and the Department of Social Services is being conducted for this measure and will be submitted to the Office of the Australian Information Commissioner to ensure implementation of the measure minimises privacy law risks.

**Rights of the child to special protection and assistance**

This right is substantially similar right to that in article 10(3) of the ICESCR which is considered above. For the same reasons, the drug testing trial is considered to be consistent with the rights of the child to special protection and assistance.

**Conclusion**

This Bill is compatible with human rights because, to the extent that it may impact human rights, the impact is for a legitimate objective, and is reasonable, necessary and proportionate as outlined above.